

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

JANICE SHARP et al.,

Plaintiffs and Appellants,

v.

PAUL ANDERSON et al.,

Defendants and Respondents.

B201093

(Los Angeles County
Super. Ct. No. GC033711)

APPEAL from a judgment of the Superior Court of Los Angeles County, Jan A. Plum, Judge. Affirmed.

Knapp, Petersen & Clarke and Kevin J. Stack for Plaintiffs and Appellants.

Paul Anderson in pro per.; Kennerly, Lamishaw & Rossi and Paul Anderson for Defendants and Respondents.

I. INTRODUCTION

This is an action between neighboring real property owners. Plaintiffs, Janice Sharp and Dane Hoiberg, sought to establish an easement for an underground pipeline supplying irrigation water to their land. The jury found in plaintiffs' favor. But the trial court granted a judgment notwithstanding the verdict in favor of defendants, Paul and Elizabeth Anderson. We affirm that judgment. We hold the trial court, exercising its equitable discretion, could properly apply the relative hardship doctrine.

II. BACKGROUND

The parties own adjoining property in the City of Pasadena (the city). Plaintiffs own lot 6. They live in a single family home there. Defendants own lot 7. Lot 7 is currently empty, pending resolution of the present dispute. Both are hillside lots improved with old rock retaining walls. Lots 6 and 7 were at one time co-owned. There is a water meter on lot 7 that serves lot 6. Underground pipes travel from the water meter across a portion of lot 7 onto lot 6. The underground pipes supply irrigation water to plaintiffs' property.

The operative pleading is a first amended complaint. Plaintiffs sought, in addition to damages, a judgment quieting title to a prescriptive easement or an implied easement, and a permanent injunction. The requested permanent injunction sought to enjoin defendants from interfering with plaintiffs' access to repair the water pipe and "other use of the prescriptive easement" on Lot 7. The trial court granted a nonsuit as to the implied easement cause of action. The jury found in plaintiffs' favor on the prescriptive easement claim, but the trial court granted defendants' judgment notwithstanding the verdict motion. The trial court concluded plaintiffs had not established a prescriptive easement; but even if they had, the harm to defendants in recognizing an easement greatly outweighed the harm to plaintiffs. The trial court also granted a new trial.

III. DISCUSSION

A. Judgment Notwithstanding the Verdict

Preliminarily, plaintiffs argue the motion for a judgment notwithstanding the verdict was premature in that the jury had not returned a verdict on *both* liability and damages. (See *Meyser v. American Bldg. Maintenance, Inc.* (1978) 85 Cal.App.3d 933, 937.) Notwithstanding plaintiffs' claim to the contrary, this issue was never raised in the trial court. As a result, the argument was forfeited. (*People v. Harris* (2008) 43 Cal.4th 1269, 1290; *Gavaldon v. DaimlerChrysler Corp.* (2004) 32 Cal.4th 1246, 1264.)

Turning to the merits, the trial court, sitting as a court of equity, employed the relative hardship doctrine and found in defendants' favor. Our review is for an abuse of discretion. (*Warsaw v. Chicago Metallic Ceilings, Inc.* (1984) 35 Cal.3d 564, 572-573; *Hirshfield v. Schwartz* (2001) 91 Cal.App.4th 749, 771.) A trial court has broad discretion to fashion equitable relief, including injunctive relief, to fit the particular circumstances of a case. (*Ojavan Investors, Inc. v. California Coastal Com.* (1997) 54 Cal.App.4th 373, 394; *Ciani v. San Diego Trust & Savings Bank* (1991) 233 Cal.App.3d 1604, 1610-1611; *People ex rel. Mosk v. National Research Co. of Cal.* (1962) 201 Cal.App.2d 765, 775; 6 Witkin, Cal. Procedure (5th ed. 2008) Provisional Remedies, § 360, p. 309; see *Biagini v. Hyde* (1970) 3 Cal.App.3d 877, 880 [court of equity may exercise discretion to withhold injunctive relief].) The Court of Appeal has held: "Equity is not limited in the scope or type of relief which may be granted. Its decrees are molded in accordance with the exigencies of each case and the rights of the persons over whom it has acquired jurisdiction. [Citations.]" (*People ex rel. Mosk v. National Research Co. of Cal.*, *supra*, 201 Cal.App.2d at p. 775; accord, *Hirshfield v. Schwartz*, *supra*, 91 Cal.App.4th at pp. 770-771; *Curtin v. Department of Motor Vehicles* (1981) 123 Cal.App.3d 481, 485-486.)

It is well-settled that a court of equity may refuse to issue an injunction for the sole purpose of protecting a legal right when the resulting harm would greatly outweigh any

benefit. (*Warsaw v. Chicago Metallic Ceilings, Inc.*, *supra*, 35 Cal.3d at pp. 572-573; *Brown Derby Hollywood Corp. v. Hatton* (1964) 61 Cal.2d 855, 858; *Dolske v. Gormley* (1962) 58 Cal.2d 513, 520-521; *Fairrington v. Dyke Water Co.* (1958) 50 Cal.2d 198, 200; *Wright v. Best* (1942) 19 Cal.2d 368, 386; *Mertens v. Berendsen* (1931) 213 Cal. 111, 115; *McKean v. Alliance Land Co.* (1927) 200 Cal. 396, 399; *Frost v. City of Los Angeles* (1919) 181 Cal. 22, 31-32; *Peterson v. City of Santa Rosa* (1897) 119 Cal. 387, 391; *Jacob v. Day* (1896) 111 Cal. 571, 579-580; *Heilbron v. Fowler Switch Canal Co.* (1888) 75 Cal. 426, 431; *Woodridge Escondido Property Owners Assn. v. Nielsen* (2005) 130 Cal.App.4th 559, 573-574; *Hirshfield v. Schwartz*, *supra*, 91 Cal.App.4th at pp. 754-755, 758-760; *Bennett v. Lew* (1984) 151 Cal.App.3d 1177, 1184-1186; *Raab v. Casper* (1975) 51 Cal.App.3d 866, 873-874; *Miller v. Johnston* (1969) 270 Cal.App.2d 289, 305-308; *D'Andrea v. Pringle* (1966) 243 Cal.App.2d 689, 698; *Oertel v. Copley* (1957) 152 Cal.App.2d 287, 289-292; *Pacific Gas & Elec. Co. v. Minnette* (1953) 115 Cal.App.2d 698, 710; *Christensen v. Tucker* (1952) 114 Cal.App.2d 554, 563-564; *Morgan v. Veach* (1943) 59 Cal.App.2d 682, 689.) This doctrine is known by several names including “balancing of the conveniences” (*Wright v. Best*, *supra*, 19 Cal.2d at p. 386), “balancing of equities” (*Scheble v. Nell* (1962) 200 Cal.App.2d 435, 438), and “the ‘relative hardship doctrine’” (*Dolske v. Gormley*, *supra*, 58 Cal.2d at p. 520). For consistency, we will refer to it as the relative hardship doctrine. The Supreme Court has explained, “The [relative hardship doctrine] is often invoked as a defense in a suit for an injunction where the plaintiff, seeking to vindicate a technical and unsubstantial right would impose an unusual hardship upon the public or the defendant.” (*Fairrington v. Dyke Water Co.*, *supra*, 50 Cal.2d at p. 200; see *City of San Marino v. Roman Catholic Archbishop* (1960) 180 Cal.App.2d 657, 678.) Under the relative hardship doctrine, it rests in the sound discretion of the trial court whether to issue an injunction to protect and preserve an easement; and if the relief sought would be of no substantial benefit to the plaintiff, while imposing an unreasonable burden on the defendant, the injunction may be denied. (*McKean v. Alliance Land Co.*, *supra*, 200 Cal. at p. 399; *Clough v. W. H. Healy Co.* (1921) 53 Cal.App. 397, 400.)

The relative hardship doctrine has frequently been employed in cases where the request is for a mandatory injunction—one compelling an act (*Ojavan Investors, Inc. v. California Coastal Com.*, *supra*, 54 Cal.App.4th at p. 394, fn. 20)—including to remove an encroachment. (E.g., *Brown Derby Hollywood Corp. v. Hatton*, *supra*, 61 Cal.2d at p. 858; *McKean v. Alliance Land Co.*, *supra*, 200 Cal. at p. 399; *Mertens v. Berendsen*, *supra*, 213 Cal. at p. 115; *Hirshfield v. Schwartz*, *supra*, 91 Cal.App.4th at p. 754; *Christensen v. Tucker*, *supra*, 114 Cal.App.2d 554, 562; 12 Witkin, Summary of Cal. Law (10th ed. 2005) Real Property, § 376, p. 440; 13 Witkin, Summary of Cal. Law, *supra*, Equity, § 172, p. 498; 2 Miller & Starr (3d ed. 2002) Cal. Real Estate Digest, Injunctions, § 31, pp. 79-80; 6 Miller & Starr (3d ed. 2000) Cal. Real Est., Encroachments, § 14:13, p. 33.) That the relative hardship doctrine is employed in such cases may reflect judicial resistance to injunctions compelling affirmative acts. (See *Allen v. Stowell* (1905) 145 Cal. 666, 669; *Shoemaker v. County of Los Angeles* (1995) 37 Cal.App.4th 618, 625.) But, as the Supreme Court held in *Allen v. Stowell*, *supra*, 145 Cal. at page 669, “The principles upon which mandatory and prohibitory injunctions are granted do not materially differ.” And the relative hardship doctrine is not limited to real property cases involving *mandatory* injunctions. (*Field-Escandon v. DeMann* (1988) 204 Cal.App.3d 228, 237; *Donnell v. Bisso Brothers* (1970) 10 Cal.App.3d 38, 44-47; *Miller v. Johnston*, *supra*, 270 Cal.App.2d at pp. 303-308.)

In *Field-Escandon v. DeMann*, *supra*, 204 Cal.App.3d at pages 231, 235-237, Division Three of the Court of Appeal for this appellate district held the defendants, by their cross-complaint, had not established a prescriptive easement for a sewer line because there was insufficient notice of adverse use. The Court of Appeal concluded, however, that an easement existed as a result of balancing the relative hardships. The court held, “The doctrine of balancing the relative hardships of the parties may be applied to determine whether to grant an injunction or to quiet title to an easement. (*Donnell v. Bisso Brothers* [, *supra*,] 10 Cal.App.3d [at pp.] 45-46; *Miller v. Johnston* [, *supra*,] 270 Cal.App.2d [at pp.] 305-308; *Christensen v. Tucker* [, *supra*,] 114 Cal.App.2d at pp. 562-563.) [¶] . . . [¶] [Plaintiff] purchased the property at a tax sale without investigating the

possibility that it was burdened with easements or other conditions which might render it unbuildable except for a brief visual inspection a few hours before the sale. He now wishes to build a 20-by-40-foot house on his property. He plans to excavate the ground surface to a depth of about eight feet, where the sewer line runs, for a driveway and a retaining wall. Evidence established that it is possible to construct the retaining wall around the existing sewer pipe. On the other hand, the sewer line is the only means of sewage disposal from the [defendants'] residence. There is no evidence that there is another sewer facility available to the [defendants]. The potential hardship to the [defendants] is 'greatly disproportionate' to the hardship to [plaintiff] by the continued existence and use of the sewer line." (*Field-Escandon v. DeMann, supra*, 204 Cal.App.3d at pp. 237-238; see *Beck Development Co. v. Sanborn Pacific Transportation Co.* (1996) 44 Cal.App.4th 1160, 1218.)

Also in *Donnell v. Bisso Brothers, supra*, 10 Cal.App.3d at pages 44-47, the Court of Appeal relied on the relative hardships doctrine to create an easement. Neighboring landowners had reached an impasse in negotiations over creating an access road. The plaintiffs obtained a temporary restraining order and, while it was in effect, completed the new road. The new road encroached on the defendants' land. The trial court found the plaintiff owned a non-exclusive easement for road purposes over the defendants' land. The defendants were enjoined from interfering with the non-exclusive easement. On appeal, the Court of Appeal held the equitable doctrine of balancing relative hardships applied: "The new construction was carried on in good faith. Donnell believed that the railroad land, upon which he had a right of way, was coterminous with Road F on which he had a similar right. Bisso had written him, not asserting that there was a land gap belonging to Bisso but demanding that Donnell stop using part of Road F which Donnell had a right to use. In fact, Bisso did not have the survey which indicated that there was an encroachment at the time his original answer to the complaint was filed. [¶] The encroachment is minimal. It is on unusable land. . . . The encroachment ties in with a long established and unquestioned easement, Road F. [¶] Although title to land is to be respected, it is not without limitation. Easements of necessity have long been recognized.

[Citation.] There is not such an easement here, but one which equity may fairly create. . . . [I]t is proper to give a fair, though prudent employment of the equitable doctrine even in favor of a plaintiff and even though his mistaken and harmless encroachment be of recent origin.” (*Id.* at pp. 46-47.)

And in *Miller v. Johnston*, *supra*, 270 Cal.App.2d at pages 305-308, the Court of Appeal affirmed the denial of the defendants’ injunction request. The defendants requested issuance of an injunction restraining the plaintiffs’ use of a mis-designed driveway. The Court of Appeal observed: the plaintiffs were innocent of wrongdoing; they would suffer great hardship if use was denied; and the defendants would not suffer any irreparable injury at all. (*Id.* at p. 307.)

The present case presents equally persuasive circumstances. Here, however, the relative hardships weigh against recognizing an easement and in favor of the defendants who oppose the easement. Plaintiffs did not need to rely on the underground irrigation system originating on lot 7. There were two easily instituted alternatives available to them. First, plaintiffs could tap into their existing domestic water system and use it for irrigation as well as household purposes. Or the city had repeatedly offered and was willing to move the water meter onto plaintiffs’ property. And defendants had been willing from the start to relocate the meter at their expense. But plaintiffs consistently refused to consider either option.

Clark Peoples Culpepper had worked for the city’s Water Department for 40 years. He observed the water meter and offered a solution to the problem. The meter could be relocated. This was something the city routinely did under such circumstances as were presented. It would only take a day or two. Mr. Culpepper offered on a number of occasions to relocate the water service, but Ms. Sharp’s response was always the same—no. Mr. Culpepper described Ms. Sharp’s response: “[I]t sounds like to me that her response was she had been using that meter, and—the way it was, and she had paid. [¶] In fact, there was new plumbing up there at the top end of all of that in the other lot. There’s a lot of new plumbing that had gone on, and she didn’t want to relocate all of that.”

James Collins, a licensed plumbing contractor, had examined the water meter. Mr. Collins testified there was no reason the irrigation pipeline could not be moved onto plaintiffs' property. The rock walls did not pose a problem. A quarrying company could core a hold in the wall. It was a "pretty common practice" to do so, and would take only about an hour's time. Or, the pipes could be run under the rock wall.

Defendants, on the other hand, could not improve their lot with a family home without interfering with the pipeline. Mr. Anderson conceded that the footprint of his planned house would not be in the area of the pipeline. He testified, however, "There's going to be a ton of activity during construction and afterwards in this area

[C]onstruction will necessitate basically excavating the whole area for grading. [¶] We're putting a basement in. All the utility lines run down in this area, because it's the lowest point on my lot, and the city utilities go into that shared common driveway that we talked about earlier." In order for defendants to go ahead with their planned improvements, the water meter and pipeline would have to be moved.

Plaintiffs offered no substantial explanation for refusing to move the pipeline other than a desire to prevent defendants from building on their land. Ms. Sharp testified at trial she would not agree to move the water meter and underground pipes because: "This is adjacent to my property, and it's actually the most convenient place for us to have a meter. [¶] Everywhere else has to go onto hardscape under walls or under the house. This is the easiest place to actually access the water to our property." Ms. Sharp further explained, "[W]e already have a property right to there. I don't see that I should be required to give up a property right that doesn't interfere with anybody else's property rights." Plaintiffs claimed at trial that an easement in their favor would not interfere with defendants' plans to build. But in an earlier State Bar complaint plaintiffs filed against Mr. Anderson, Ms. Sharp had averred, "In a related case my husband and I also sued Paul Anderson to quiet title to a prescriptive easement on his adjoining lot which would effectively prevent development on his lot." (The State Bar complaint was dismissed without prejudice.)

Mr. Hoiberg testified that during the course of the present dispute, he had considered moving the water meter from lot 7 to lot 6. He was aware that the city would come out at his request and relocate the water meter. But Mr. Hoiberg objected to doing so. He explained: “[I]t is about a number of issues, and [defendants’ plans to build on lot 7 is] one of them. [¶] It also involves what we want to do with our property, and what we’ve long planned to do in how the watering system was—we had re—had fixed up to have a line and get somewhere under a rubble wall, under arroyo rock wall without doing engineering work.”

There was further evidence plaintiffs’ real goal in bringing this action was to prevent defendants from building a family home on their land. Mr. Anderson testified Ms. Sharp had objected to defendants’ plans to build on the lot from the start. She had written letters to all the neighbors saying they had to save the neighborhood from defendants building on the lot. Plaintiffs readily admitted they did not want defendants to improve their property. Ms. Sharp testified, “I certainly do not want them to build [on their lot]” Plaintiffs maintained lot 7 was non-buildable. Plaintiffs asserted the homeowners’ association’s board of directors had improperly authorized defendants’ planned improvements instead of soliciting votes from the association’s members as required. Plaintiffs had filed an action against the homeowners’ association so asserting. Defendants were named in that lawsuit. This was one of three lawsuits brought to prevent defendants from improving their lot. Plaintiffs also filed a lawsuit against the city asserting it had issued defendants an invalid building permit. And the present lawsuit was filed in 2004 immediately upon plaintiffs discovering defendants’ construction plans. Plaintiffs made no attempt to discuss their purported easement with defendants. Mr. Anderson’s parents lived on neighboring lot 5. Mr. Anderson’s mother testified her relationship with plaintiffs was “neighborly” until it was announced that defendants might build a house on lot 7.

The defendants are innocent of wrongdoing, while the plaintiffs have steadfastly refused to accept a reasonable resolution of the situation. Defendants would suffer great injury were plaintiffs to be granted an easement for the underground irrigation pipes.

Defendants would be unable to build a home on their property. Plaintiffs, on the other hand, suffer no significant injury if an easement is denied. The water meter can be moved to and the irrigation pipes rerouted on plaintiffs' property. Alternatively, plaintiffs can tap into their existing domestic water supply infrastructure for irrigation purposes. The trial court did not abuse its discretion. Because we affirm the order granting defendants' judgment notwithstanding the verdict motion, we need not consider the trial court's new trial ruling. (Code Civ. Proc., § 629; *Borba v. Thomas* (1977) 70 Cal.App.3d 144, 147, fn. 1.)

B. Nonsuit

As noted above, the trial court granted a nonsuit as to plaintiffs' implied easement claim. Plaintiffs argue the trial court erred in so doing because they established their right to an implied easement. We affirm the nonsuit order.

We review the trial court's nonsuit order pursuant to the following standard of review: "A motion for nonsuit allows a defendant to test the sufficiency of the plaintiff's evidence before presenting his or her case. Because a successful nonsuit motion precludes submission of plaintiff's case to the jury, courts grant motions for nonsuit only under very limited circumstances. (*Campbell v. General Motors Corp.* (1982) 32 Cal.3d 112, 117.) A trial court must not grant a motion for nonsuit if the evidence presented by the plaintiff would support a jury verdict in the plaintiff's favor. (*Id.*, at pp. 117-118; *Ewing v. Cloverleaf Bowl* (1978) 20 Cal.3d 389, 395.) [¶] 'In determining whether plaintiff's evidence is sufficient, the court may not weigh the evidence or consider the credibility of witnesses. Instead, the evidence most favorable to plaintiff must be accepted as true and conflicting evidence must be disregarded. The court must give "to the plaintiff[s] evidence all the value to which it is legally entitled, . . . indulging every legitimate inference which may be drawn from the evidence in plaintiff [s] favor . . .'" (*Campbell v. General Motors Corp.*, *supra*, 32 Cal.3d at p. 118, quoting *Elmore v. American Motors Corp.* (1969) 70 Cal.2d 578, 583; accord *Ewing v. Cloverleaf Bowl*,

supra, 20 Cal.3d at p. 395; *Estate of Lances* (1932) 216 Cal. 397, 400.) [¶] In an appeal from a judgment of nonsuit, the reviewing court is guided by the same rule requiring evaluation of the evidence in the light most favorable to the plaintiff. ‘The judgment of the trial court cannot be sustained unless interpreting the evidence most favorably to plaintiff’s case and most strongly against the defendant and resolving all presumptions, inferences and doubts in favor of the plaintiff a judgment for the defendant is required as a matter of law.’ (*Mason v. Peaslee* (1959) 173 Cal.App.2d 587, 588; accord *Miller v. Los Angeles County Flood Control Dist.* (1973) 8 Cal.3d 689, 699; *Hughes v. Oreb* (1951) 36 Cal.2d 854, 857.)” (*Carson v. Facilities Development Co.* (1984) 36 Cal.3d 830, 838-839; accord, *Nally v. Grace Community Church of the Valley* (1988) 47 Cal.3d 278, 291.)

Creation of an implied easement requires the existence of three elements: separation of title; before the separation takes place, the use which gives rise to the easement must have been of such duration and so apparent as to show that it was intended to be permanent; and the easement must be reasonably necessary to the beneficial enjoyment of the property. (*Leonard v. Haydon* (1980) 110 Cal.App.3d 263, 266; accord, *Mikels v. Rager* (1991) 232 Cal.App.3d 334, 357; see also *Owsley v. Hamner* (1951) 36 Cal.2d 710, 718-719 [an implied easement must be “‘reasonably necessary for the beneficial enjoyment of the property’”]; *Larsson v. Grabach* (2004) 121 Cal.App.4th 1147, 1152 [same].) Even if there was evidence to support the first two elements—a question we do not decide—viewed in the light most favorable to the plaintiffs, there was no evidence an easement was reasonably necessary to plaintiffs’ enjoyment of their land. The evidence showed plaintiffs had alternative means to irrigate their land. Ms. Sharp’s testimony that, “Everywhere else has to go onto hardscape under walls or under the house,” does not establish that it was reasonably necessary for plaintiff’s enjoyment of their land that the water meter remain on defendants’ property. Therefore, it was not, as plaintiffs contend, error to grant the defendants’ nonsuit motion.

IV. DISPOSITION

The judgment is affirmed. Defendants, Paul and Elizabeth Anderson, are to recover their costs on appeal jointly and severally from plaintiffs, Janice Sharp and Dane Hoiberg.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P.J.

We concur:

ARMSTRONG, J.

MOSK, J.